

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARK E. HAMISTER, OLIVER HAMISTER,
GEORGE HAMISTER, HEALTH SERVICES OF
NORTHERN NEW YORK, INC., BROMPTON
HEIGHTS, INC. and ORCHARD HEIGHTS, INC.,

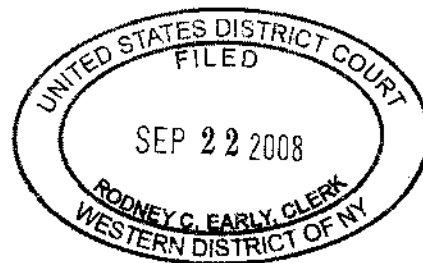
Plaintiffs,

ORDER
06-CV-0600A

v.

LIBERTY MUTUAL INSURANCE
COMPANY, LIBERTY MUTUAL FIRE
INSURANCE COMPANY, LIBERTY INSURANCE
CORPORATION, LM INSURANCE CORPORATION,
THE FIRST LIBERTY INSURANCE
CORPORATION, and HELMSMAN
MANAGEMENT SERVICES, INC.,

Defendants,



Defendants, Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, Liberty Insurance Corporation, LM Insurance Corporation, The First Liberty Insurance Corporation and Helmsman Management Services, Inc. (hereinafter referred to as "Defendants") moved this Court to dismiss the Amended Complaint of plaintiffs, Mark E. Hamister, Oliver Hamister, George Hamister, Health Services of Northern New York, Inc., Brompton Heights, Inc and Orchard Heights, Inc. (hereinafter referred to as "Plaintiffs") pursuant to Fed. R. Civ. P. 12(b)(6), and to consolidate this action with National Healthcare Affiliates, Inc. v. Liberty Mutual Insurance Company, No. 01-CV-798A, and for sanctions pursuant to Fed. R. Civ. P. 11.

Plaintiff opposed the motion to dismiss and for sanctions but did not oppose the motion to consolidate.

This case was referred to Magistrate Judge H. Kenneth Schroeder, Jr., pursuant to 28 U.S.C. § 636(b)(1). On July 2, 2008, Magistrate Judge Schroeder issued a Report and Recommendation, recommending that the motion to dismiss be granted in part and denied in part. Specifically, Magistrate Judge Schroeder recommended that: (1) all of plaintiffs' claims against defendants Liberty Mutual Fire Insurance Company, Liberty Insurance Corporation, LM Insurance Corporation, The First Liberty Insurance Corporation, and Helmsman Management Services, Inc. be dismissed as they are not proper parties; (2) plaintiffs' claims against Liberty Mutual Insurance Company for breach of contract, negligent performance, deceptive business practices, fraud, and unjust enrichment be dismissed; (3) the motion to dismiss plaintiffs' breach of fiduciary duty claim be denied; (4) the motion to dismiss plaintiffs' good faith and fair dealing claims accruing after August 18, 2000 be denied, but granted as to claims accruing before that date; and (5) plaintiffs' claim for punitive damages be dismissed as to the breach of duty of good faith and fair dealing claim, but denied as to the fiduciary duty claim. Additionally, Magistrate Judge Schroeder recommended that the motion to consolidate be granted and that defendants' motion for Rule 11 sanctions be granted.

Defendant Liberty Mutual Insurance Company filed objections to the Magistrate Judge's recommendation that the motion to dismiss be denied as to plaintiffs' breach of fiduciary duty claim and plaintiffs' request for punitive damages

based upon that claim. Objections were also filed by plaintiffs' former attorneys as to Magistrate Judge Schroeder's recommendation to impose Rule 11 sanctions.

The parties appeared for argument on the objections on August 26, 2008, at which time defendants' withdrew their application for sanctions and plaintiffs stipulated to the dismissal of their claim for breach of fiduciary duty and for punitive damages.


Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Amended Report and Recommendation to which objections have been made. Upon a *de novo* review, and after reviewing the submissions and hearing from counsel, the Court adopts Magistrate Judge Schroeder's recommendation to dismiss plaintiffs' claims against Liberty Mutual Insurance Company for breach of contract, negligent performance, deceptive business practices, fraud, and unjust enrichment, and all of plaintiffs' claims against defendants Liberty Mutual Fire Insurance Company, Liberty Insurance Corporation, LM Insurance Corporation, The First Liberty Insurance Corporation, and Helmsman Management Services, Inc. Accordingly, for the reasons stated by Magistrate Judge Schroeder, those claims are hereby dismissed.

The motion to dismiss motion to dismiss plaintiffs' good faith and fair dealing claim is denied as to claims accruing after August 18, 2000, but granted as to claims accruing before that date. Additionally, upon the parties' consent, plaintiffs' claim for breach of fiduciary duty is dismissed and the defendants' motion for sanctions

is deemed withdrawn. Further, this case is hereby consolidated with National Healthcare Affiliates, Inc. v. Liberty Mutual Insurance Company, No. 01-CV-798A.

This case is referred back to Magistrate Judge Schroeder for further proceedings.

SO ORDERED.


HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATED: September 22, 2008